UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 22 Cr. 276 (LTS)

GREGOIRE TOURNANT,

Defendant.

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New York, N.Y.
April 19, 2023
2:30 p.m.

Before:

HON. LAURA T. SWAIN,

Chief Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: MARGARET GRAHAM
ALLISON NICHOLS
Assistant United States Attorneys

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-and-
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OLIVIA RAUH

(In open court; case called)

THE COURT: Good afternoon.

Counsel, would you introduce yourselves, please.

MS. NICHOLS: Good afternoon, your Honor. Allison Nichols and Margaret Graham for the government.

THE COURT: Good afternoon, Ms. Nichols and Ms. Graham.

MR. LEVINE: Good afternoon, your Honor. Seth Levine and Alison Bonelli, from Levine Lee, for Mr. Tournant.

THE COURT: Good afternoon, Mr. Levine and Ms. Bonelli.

MR. ALONSO: Good afternoon, your Honor. Daniel Alonso, from Orrick, Herrington & Sutcliffe, together with Olivia Rauh, for Mr. Tournant.

THE COURT: Good afternoon, Mr. Alonso and Ms. Rauh.

Good afternoon, Mr. Tournant.

THE DEFENDANT: Good afternoon, your Honor.

THE COURT: Please be seated.

And good afternoon to everyone who is here in the spectator section.

My rule for these proceedings is that speakers can take their masks off while they are speaking. Since I will be doing a fair amount of speaking and I am sitting by myself, I will take my mask off now, and that might make it easier for you to hear me as well.

I remind everyone that as provided in the Court's standing order, there is to be no recording or retransmission of any part of this proceeding.

We are here today for oral argument on the two motions of Mr. Tournant that are currently pending in the first wave, which is the motion to dismiss the indictment, which I may refer to from time to time as the privilege motion, and the motion to compel certain searches and production, which I will refer to as the *Brady* motion.

I have read carefully all of the submissions in connection with each of the motions, and so, counsel, you can be confident of that as you decide how to allocate your time. And I have over all allocated each side a total of 45 minutes for argument of the two motions, which would include any rebuttal time.

So my first question for you all is whether you have decided to argue the motions separately or to have overall arguments that will encompass both motions, basically tell me anything you need me to know about the timing allocations and sequence.

So I will first ask Ms. Nichols.

MS. NICHOLS: Thank you, your Honor.

For the government, Ms. Graham and I are dividing the motions. So I will be handling the privilege motion and she will be handling the *Brady* motion. And it was our anticipation

that we would go second after the defense has had an opportunity to speak first.

THE COURT: Mr. Levine.

MR. LEVINE: Yes, your Honor.

Your Honor, a preliminary question, if I might. In our view, as you know, we have expressed in our papers on the privilege, as you call the privilege motion, there is a matter in the paper that's under seal. We continue to believe, and consistent with previous practice in this court, that the appropriate people to be arguing this is the filter team, not the trial team. And that's why we have competing papers from them with different information. So I renew that objection. Given that the government has elected a filter team -- I think that they have admitted they are tainted, if the other factors are established, but nonetheless --

THE COURT: I'm sorry. You said, I think they have admitted to something.

MR. LEVINE: They suggested that they had access to materials, that they were tainted. It's undisputed that many of the notes and materials were in possession of members of the trial team. But, nonetheless, I am pointing out, in my previous experience with *Kastigar* issues, the Department of Justice had a separate team. I don't know how we are going to deal with the fact that we have got sealed materials that I certainly do intend to reference, at least for the Court.

That's one issue.

The other issue --

THE COURT: I guess I had the naive hope that you all would have worked out some agreed way of dealing with that before we got here today.

MR. LEVINE: I apologize, your Honor. We made that point in our papers. Frankly, we didn't confer with the government. I did speak with the taint team, who is here, and expressed that continued to be our view. But I wanted to at least -- we do not want to do anything to suggest that we are waiving any privilege or have done anything that would allow privileged materials to be further disseminated.

THE COURT: Ms. Nichols, did you want to respond to that?

MS. NICHOLS: I do, your Honor.

Just to circle back, I don't think that's an accurate representation either of what was said at the previous conference or of the government's position with respect to these motions. It's our position, respectfully, that this is not a *Kastigar* issue, and so we have not conceded that the prosecution team is tainted, and we do not believe that that is so.

We do think that the case team is appropriately the people who would argue this motion. That's our intention here today. Obviously, there are things under the redactions that

we cannot see. And so obviously we will not be addressing those points. But I think what we propose, and what we think makes sense here today, is that the parties proceed with the unredacted materials, and only in the event, if further inquiry into the sealed matters is required --

THE COURT: I'm sorry. Just for clarification, do you mean that the parties should proceed as to the redacted materials as opposed to basing the arguments on the unredacted materials?

MS. NICHOLS: The latter. I think the parties should base their arguments on the materials that -- let me start over.

THE COURT: The materials that are public.

MS. NICHOLS: The public materials, your Honor. The ones that the case team have been able to engage in with our briefs. We think that those are the appropriate set of arguments and issues to engage with here today.

THE COURT: You would not be planning to refer in your arguments to any of the materials that have been restricted to the filter team. And I do understand the questions of whether there is a privilege, the question of whether *Kastigar* is appropriate under these circumstances are among the issues that will be argued here today. So I don't consider them to have been resolved.

MS. NICHOLS: Right. Thank you, your Honor.

THE COURT: So, Mr. Levine, do you think that reference to the content of any of the materials that you contend are privileged will be necessary in connection with your argumentation today, reference to the content of any of those materials?

MR. LEVINE: Your Honor, the government has at times taken factual positions that are 180 degrees from what those materials show. Frankly, I am a little bit at a loss, which is not that common for me, because this is a hearing on a sealed portion motion that is about a *Kastigar* issue. So the government's position, and we have raised this from the beginning, this is about the privilege matter. That's why we filed all of this stuff under seal. The government is taking, I think in my experience, a relatively unique position. That's why you have a filter team, to avoid exactly this problem. And, in fact, it's the refusal of the government to respect privilege which brings us here today.

So, I can certainly try, your Honor, and I can come up to sidebar, if you would like, on things that I know are privileged, but I am certainly going to make argument today, because the issues that they have challenged include what people knew and the nature of, for example, the prep session that happened. Those representations the government has made in both of their papers is just wrong. But I tend to rebut them, even though the government has not offered any factual

basis for their positions. So I will do the best I can, but that's exactly why I raised this issue in our papers.

I would also like to bring to the Court's attention page 25 of the transcript of October 27, 2022, where the government said: "We have been clear on this. We are not here silently saying -- we are not taking a position on what was shared with the prosecution team. We said it was accessible to the prosecution team and accessible to the AUSAs' own case, and it was accessible to all agents. We are saying that defense counsel can assume that for the purpose of bringing forth this motion."

So, as I said, we have taken the position that they don't deny that some of the folks' -- sitting in front of me -- own notes, which contain this material, hasn't tainted them, if in fact the Court determines that those are privileged matters. So when counsel stands up and says they haven't conceded that, I don't quite know what they are talking about. But I just commend the Court to the transcript on page 25, which I think is also noted in our briefs on this point.

On the *Kastigar* issue, I will say, your Honor, it is our firm position under the law that the heavy burden is on the government in this proceeding and in all others. So I will be guided however the Court wants to proceed. I will reserve substantial amount of my time for rebuttal, hopefully about 25 minutes. If the Court wants to proceed in that manner, that's

fine with me.

I intend to divide my initial argument between the privilege issue and the *Brady* issue, although I will tell the Court just to be clear, there is intersection, in the sense that one of the main issues here is what the SEC and the government talked about. I can't answer those questions because they won't give me the material. But that's how they in some way do intersect. So they are not totally independent issues. I just wanted not to be confusing if I am referring in the first argument to things with the SEC. The reason is because they are interrelated and not because I am talking about the second argument.

THE COURT: I appreciate that by way of clarification. Let me just say a couple of things.

As to *Kastigar*, it seems to me that the question at this stage -- well, there are two predicate questions, really. One that is a through-line through all of the arguments, which is, is this material privileged at this point in time? And that goes to waiver issues. And the government has also alluded to a potential crime fraud exception argument, and to the extent the government wants or intends to press that, I will be looking for them to identify for me in the record where they have raised that now or when they would want to raise that.

So, if we have material that isn't privileged, wasn't

privileged at the time it was disclosed, that's one picture, and I certainly expect counsel to engage with that issue of whether the privilege has been preserved. And then to the extent that we -- we will be addressing *Kastigar* one way or another because obviously the defense contends that there is a privilege that was preserved and the defense contends that, because of that, there is taint.

I don't expect the parties to be in a position today to argue about whether a *Kastigar* burden, if *Kastigar* is appropriate, has been carried because the *Kastigar* application of the defense is for discovery and testimony and anticipates a lot of things that aren't in the record now. So my focus has been on whether there is a predicate for a *Kastigar* hearing, and if so, what that would look like. So that might help you a bit, Mr. Levine, in fashioning your boundaries in terms of argumentation, and if you think my view of the structure is wrong, if we need to run up to the sidebar, we will all go to the sidebar.

So I think that's all that I can say about those matters at this time, and I have read the papers.

So I think it is time for us to go to arguments.

So, as I understand the time division, Mr. Levine, you will be doing the entire argument. We will allot you 20 minutes to start.

Then we will allot the government its full 45 minutes.

Would you like us to run the clock at -- I have an argument clock with nice little lights, just like the Second Circuit, and the yellow light will go on, I think it's three minutes before time is out. Would you like us to set you for 22 and a half and 22 and a half or should we just set you for 45?

MS. NICHOLS: That's fine, your Honor. I don't think we are going to need 45 minutes either way, but maybe a clock will help ensure that we keep mindful of the time.

THE COURT: If you're working from the podium, there is actually a digital clock there that will tell you how much time has elapsed.

MR. LEVINE: I can use all the help that I can get. So if you can sit the initial clock for 20 minutes, that will be great. Ms. Bonelli is also going to enforce the time limits.

THE COURT: We will do that.

Defense counsel will start with 20. And when defense counsel comes back, we will set you again for 25 for your rebuttal.

MR. LEVINE: The other thing is we are going to show you a few slides. I will tell you now, several of those slides, including the slides that reflect the prep session Q and A, are absolutely sealed and privileged. We can try to not display them on their screen, but those are things that I think you need to see. Several of these slides are in the sealed

record.

THE COURT: Did you bring paper? Let's use paper for those. Otherwise it will display for all counsel and me. And if you put it up, it will also display for everybody in the gallery.

Do you want to bring the collection of paper up now. And if you have a copy for the court reporter as well, that will help.

MR. LEVINE: I am just going to set up, if I can.

MS. BONELLI: Can I approach, your Honor?

THE COURT: Yes.

Do you have a third copy for my law clerk?

MS. BONELLI: I do.

THE COURT: Thank you.

Are you ready?

MR. LEVINE: May I?

THE COURT: Yes. You may proceed.

MR. LEVINE: May it please the Court, thank you so much for hearing us today, your Honor.

In *Stein*, the Second Circuit, about 15 years ago, taught us this: An adversarial relationship does not normally bespeak partnership. KPMG faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient, easily sufficient, to convert its adversary into

its agent, and ruled that, in fact, a portion of the same historic provision in the government's cooperation policies, which cover attorneys' fees and joint defense activities, was unconstitutional. Same provision. We are back 15 years later. It's time for the second half, respectfully, your Honor.

In Sullivan & Cromwell's own words, this case is about death. Death, even corporate death, is different. Faced with such a threat, entities, even the most powerful and well-heeled on this planet, just like a regular person, can be broken. And that's what happened here.

To survive, and when faced with such a threat, artificial and natural people just want to survive, the government gives a simple utilitarian choice. Give us your executives, all or nothing. Give us people to prosecute, and don't you dare allow any kind of privileged arrangements that you have made before to disable you from giving us information we want. And it's all or nothing.

There has been no challenge in the government's papers to our interpretation of these policies. None at all. And I would respectfully suggest, your Honor, that when life is on the line, corporate life for sure, the result is that people do things that in other situations they would not. Like finding folks that happen to be out on disability to blame. Like breaching fundamental bedrock principles of our system relating to the attorney-client relationship, which is the foundation of

the entire adversary system.

Judge, we ask you for two things today with respect to the privilege motion:

One, based on the standards articulated in *Schwimmer*, and explained to this Court, this conduct is manifestly and avowedly corrupt because of what it does to our system of adversary justice. It undermines and destroys it.

Second, because privileged information has been used, the attorney-client relationship has been abused. There is no question that *Kastigar* applies. Not only did the Circuit hold that in *Schwimmer*, but Judge Gardephe, after an exhaustive review of the law in this area just two years ago, found that *Kastigar* applies, and the government agreed. So why we are here debating whether *Kastigar* applies, after it has been applied by the Circuit in *Landji*, in *Hoey*, and many cases, and the government itself acknowledged it, I don't understand. I can only say that they are leading you into error.

There is no question that if this Court, in my respectful opinion, does not dismiss this case now, a hearing must be held both on the relationship between the government and corporate partners, if the Court does not just accept our view of the policy; and, two, unquestionably, as it has in every case, a *Kastigar* hearing has to be held. And I would point out, in *Stein*, Judge Kaplan held a three-day evidentiary hearing.

THE COURT: I just want to stop you. You say on the relationship between the government and corporate partners. Do you mean the government --

MR. LEVINE: Allianz and S&C.

We believe that all of this conduct was directly attributable to the government. They are responsible for the breaching of the relationship. We believe the policies are the encouragement of that, just as Judge McMahon found in *Connolly*, that the policies encouraged the interpretation. And, therefore, if there is a contest on that issue, which the government has not made in its papers, as Judge Kaplan did, we have to have a hearing, respectfully.

Now, what is so unique about this case is that this is a case that doesn't happen very much. It's about something that is really inimical to our system. And it's the idea that an attorney switches sides, goes from zealous advocate, as you are required to be, for their client in the criminal justice system to being their zealous opponent. This doesn't happen because it is so far out of the norm. It is so far beyond what is acceptable.

I don't ask your Honor today to blaze a new path. You don't need to. What I ask you to do, though, is to enforce the guardrails that protect the adversary system and people's rights. Because absent that, allowing attorneys to switch sides, as the court in *Schell* noted, is really defacing our

most sacred rights. It is the essence of what gives us protection. In *Schwimmer*, the court pointed out that the attorney-client privilege is the soil in which all of our rights grow. As they said, if you don't have the attorney-client relationship, our rights are meaningless. And here, what the government with its policies is doing is choking the water from that soil; and then in our other motion, the *Brady* motion, they are also trying to obscure the light because they don't want us to get information that lawyers can use to effectively advocate.

THE COURT: As you pointed out in your papers, you believe that in order to put itself in a position to have whatever flexibility it might need to maximize its protection or chances under the cooperator guidelines, Allianz and Sullivan & Cromwell structured an engagement agreement that had provisions for what you have characterized as advance waiver, but did lay out a system in which Mr. Tournant was made aware that Allianz would control the privilege, and it was possible that Allianz could waive this privilege and waive it for him and provide the information to the government. Mr. Tournant had separate counsel, it seems to me from the papers, even before he signed that engagement agreement. And so, are you telling me that the ethical rules preclude the validity of that sort of an agreement even knowingly entered into?

MR. LEVINE: What I am telling you, your Honor,

respectfully, is one: The agreement, which is an entirely one-sided one, has one piece of protection for Mr. Tournant. And that protection is that if at any time there is anything that can be a conflict that might make it either just inadvisable or improper for Sullivan & Cromwell to continue -- and this agreement remains under seal but I will just say it generally -- then they must resolve that conflict before another word is spoken.

And in this case, as the Court knows, that conflict absolutely ripened weeks, a week and a half, two weeks before the relevant meeting that we are talking about. There was no waiveable conflict. It was unwaiveable. Because at that point they knew that they had a conflict between multiple clients of theirs. Mr. Bond-Nelson was their client. Mr. Taylor was their client. And if you look at the page 3 of the chart, they are the three folks that are on this chart.

It is an unwaiveable conflict. Even if it was waiveable, which it wasn't, that requires a waiver; and either under 1.7 or 1.9, that waiver has to be in writing, and it has to done with full disclosure of the entire set of information they had. But they didn't do that. In fact, as we have proven in our papers -- and the government cannot contest it, they have no basis to -- there was deception and a lack of candor. There was an ambush, in which information that was absolutely material and was quickly proffered to the government was not

revealed either to Mr. Tournant or to his other counsel. And there was basically, in our view, a complete undermining of his rights.

The government argues, inconsistent with the engagement letter and the long-standing law in the state of New York, that somebody can sign a contract of adhesion to waive something and that's all that happens. The attorney-client privilege is not a game of Three-card Monte; you can check at the end to see if it had it. Once a conflict is raised, and it clearly was raised here, even if it is waiveable, which it was not here, because it's obviously unwaiveable, you have to get informed consent, which requires full disclosure. Because they were under such enormous pressure, they made a terrible mistake. They were trying to save the life of one client at the expense of the other. So the language of the agreement itself refutes the government's point. But if you were to interpret the agreement, your Honor, in a way that gives Mr. Tournant, not loyalty, not confidentiality, and not candor, it is not an attorney agreement.

And let me tell you why this is happening, Judge. The SEC has a rule, not contested by the government. It says you can't show up at SEC testimony if, if, you're not personally represented. Ropes and Sullivan & Cromwell wanted to be in the room. So they had to represent that they were lawyers. They took on the joint representation. And when it became

inconvenient, when the government was threatening Allianz's life, they said, you know what, forget it, we are just going to pretend that this is just an *Upjohn* situation. That is fundamentally wrong.

And the government absolutely encouraged it. We believe the government knew from the outset. The SEC knew. They knew that Mr. Bond-Nelson was represented by S&C and Ropes as well. And they are going to have us believe that even though they won't tell us they are interacting with the SEC, they are filing applications the very week that Mr. Bond-Nelson walks out of the SEC, that they somehow don't know about this? They gave Allianz the best cooperation credit they could get. They didn't charge Allianz. They let all their affiliates go. They let them strip AGI US of all its real assets. Based on the idea that they were such good cooperators. Is it the government's position that they were fooled into knowing that Mr. Tournant was not represented by Sullivan & Cromwell or did they know? It doesn't matter. Either way, the knowledge is imputed to them, and we believe they actually knew.

But what happens? When my colleagues and I learned about this and said, wait a second, stop the presses, you have privileged material, did they change their position? No. They had them back in. They had them back in, where not only were they presenting facts, they were actively advocating for the destruction and prosecution of my client.

Here it is: "Sitting here where I am would like to see you prosecute Greg Tournant. I would like to help you do that but may not have anyone to help you do that if guilty plea."

These are his lawyers, your Honor. They are his lawyers. And they are standing before the government and saying, please don't kill my other big corporate client, go after this guy. You can't do that. And if you can do that, then every single person who has a personal counsel has to worry about their privilege, has to worry, can I really talk to them, can I have a free and frank exchange? And that is the end of the privilege.

THE COURT: Well, every person who has a personal counsel and has an engagement letter of the sort that was present here. But it seems to me that, absent this unusual sort of engagement letter, you would have a much clearer ethical situation, and the connection between the ethical violation and the contract validity issues is still one that I would either now or in rebuttal want to hear more about. If there is an ethical violation, certainly disqualification of the counsel, and perhaps termination of the dual representation.

I would like you to draw me as fine a diagram as you can, by reference to specific authority as to the waiver invalidity point, whether it's *ab initio*, whether it became

illegal or invalid at a point and what that point was, and what its implications are for what could or could not have been disclosed.

MR. LEVINE: Your Honor, the moment that conflict arose, and there is no question it arose no later than the 22nd of May, when the S&C said they changed their entire approach and started cooperating. The agreement says that if there ever comes a time that it may become inadvisable and improper for us to continue to represent you, we will discuss the situation with you with a view of arriving at a mutual agreeable solution. And the prior paragraph says, if we have to withdraw, we have to withdraw. That all happened before this meeting.

Then in the lead up to that meeting, they did a forensic investigation they didn't reveal. And here is a slide, Judge, that shows you the timing. They initiated their investigation on May 22. They knew already. Even in the meeting with him they were saying, We understand that you're being accused of telling Bond-Nelson to alter things. They knew already. They knew exactly what was going on. And, in fact, they purposely withheld information on his cell phone from him so they can surprise him. And the entire meeting, from a few minutes into it, was an exercise to elicit damaging testimony, to elicit materials so they could sell it to the government in exchange.

In fact, if you put up the slide of the timeline of cooperation, you will see, your Honor, that the first entry, which is slide 2, the very first entry of what they claim credit for is the issues about this cell phone. If you look at the bottom left. That's what they surprised him with.

This was supposed to be prep for testimony. I will tell you, your Honor, when you're prepping somebody for government testimony, it is one of the most complicated, most important jobs you do. And the decisions you make about whether to testify and how to testify are the core of what a defense lawyer's job is. Here, they bamboozled him, they ambushed him, and then they gave the government the thing they would not have, which is the equivalent of an interview, a proffer, or testimony that Mr. Tournant never gave. They got in the defense camp and they basically flipped his lawyer. And there is nothing in the engagement letter -- in the rules of ethics say, once the circumstances change, no blanket waiver is valid; you have to give specific information of what you know.

They walked into a room and didn't even tell his other lawyer what the information was that they had. You can't do it that way. As I said, this is not a game, a joke. They are his lawyers. If they didn't want to be his lawyers, they didn't have to. But when you take that on, you have, as *Schell* says, a sacred obligation to defend him.

How would it be, your Honor, if six months from now I

walked back into the courtroom to advocate for an alleged victim, to advocate for the government's position against Mr. Tournant? I ask you: How would you react to that, if I came to you and said I have a letter that says I can do this? I think it would be an unforgivable thing. And that's the same thing that happened here.

I would also say to you, your Honor, very quickly, *Schell*, which is the lead case from the Fourth Circuit on this, in that case, no privilege information, almost no contact. The Fourth Circuit says, We can't live with this; we throw it out. *Sabri*, Western district of New York, a lawyer gets intermixed with the government. Throw out a portion of the indictment. The government's response is that *Schell* is out of circuit and old. It is. But they don't say it's not right. It's good law, and it's good law because it is so rare that this happens. This should not happen.

And what is happening here is that the government and their cooperation policies, which insist on all or nothing, will not even let the little space exist for the attorney-client relationship. Everything else the company has to do. And, your Honor, it is distorting our entire system of justice, and it is, as they said in *Schwimmer*, threatening to destroy, destroy the underpinnings of this entire adversary system. And I am not being hyperbolic. This Court, respectfully, needs to do something similar to what Judge

McMahon did and what Judge Kaplan and the Circuit did in *Stein*, and say -- that was only about attorneys' fees. This is actually flipping someone's lawyer.

The adversary system is the heart of this system, and if you can't trust your lawyer, if they are here to trick you, you might as well not bother with all of this.

Thank you, your Honor.

THE COURT: Thank you, Mr. Levine.

You want us to start you at 45 minutes?

MS. NICHOLS: That's fine, your Honor. Thank you.

Thank you, your Honor.

So I will start with the two questions that the Court posed to guide the parties here today. First, is this material privileged? The answer is no. And the second question is: Has a predicate been established to hold a *Kastigar* hearing or a *Kastigar*-like hearing or a hearing of any kind? And the answer is also no, for the same reason, your Honor.

The information that Allianz, through its attorneys, gave to the government, regarding information that they had obtained from Mr. Tournant, was information that Mr. Tournant knowingly and intelligently waived when he agreed, in writing, while advised by incredibly experienced defense attorneys, including one defense attorney representing only him, and loyal only to him, that Allianz would control the attorney-client privilege over information that was learned during their joint

representation.

It is Tournant's burden here to demonstrate the existence of a privilege and that he took steps to ensure that it was not waived. And he cannot make that showing. He does not even claim that he did not understand the written waiver that he signed. He does not claim that he was coerced into signing the engagement letter that contained the applicable waiver. And he does not claim that he received misleading or incorrect advice about what that waiver means, and about what it didn't mean.

He does not claim that when he signed a document saying, I understand the implications of this joint representation, including the benefits and the risks involved, that he didn't understand. He doesn't claim that he didn't understand the risks that were specifically enumerated in that written agreement, including that if a conflict arose, Sullivan & Cromwell might be required to terminate the relationship, including the risk that he waived any conflict of interest that would otherwise prevent Sullivan & Cromwell from continuing to represent the company, and including, most applicable here, the risk that confidential information that he shared with Sullivan & Cromwell could be shared with the government if the company determined that that were appropriate.

THE COURT: Well, Mr. Levine is saying, among other things, that he didn't take the risk, at a time when he

believed that S&C was still his lawyer, that he was sharing information with them for purposes of legal advice to him, that they had already decided that they would not be his lawyer, that the fundamental premise of the relationship, which should have been terminated, it was no longer there, so that he was, if not lulled into signing the engagement agreement with its waiver provisions, was lulled into disclosures of specific information in this June 3rd meeting, at a time when the lawyers had already turned against him. Is that a risk that he knowingly undertook under that engagement agreement?

MS. NICHOLS: Your Honor, I think, first of all, we have no reason to believe the premise underlying that argument. I think that there is no reason, on the facts that the government has access to, to believe that there was any ethical breach by Sullivan & Cromwell here. And I think it's important to keep in mind the timeline and the inference that the defense is asking the Court to draw to make that conclusion.

Mr. Bond-Nelson testified on May 20 and May 21. He ended that testimony early on the second day. And then, through only his individual counsel, he reached out to the government and began cooperating.

According to the slide that defense counsel just put up, Sullivan & Cromwell or Allianz began a forensic investigation on May the 22nd. And so, if I am understanding Tournant's position correctly, he seems to think that Allianz

should have dropped him as a client before engaging in any investigation. And that requirement is not what this engagement letter contemplated. Nor is it a one-sided agreement, as he just said.

Mr. Tournant, while advised by competent and experienced counsel, chose to undertake both the risks and the benefits of joint representation. And that included getting access to corporate documents, to corporate employees, knowledge of Allianz's productions and presentations to the SEC, and understanding and the ability to analyze how his documents and statements would relate to other potential witnesses and Allianz employees.

THE COURT: Well, I would like you to just focus on that time period between the 22nd of May and June 3rd. I am hearing an argument that they not only undertook this investigation, which included investigating the client, Mr. Tournant, but they developed information adverse to Mr. Tournant, elaborated on that investigation by questioning him about the information without disclosing it to him at a time that they were still ostensibly in an attorney-client relationship, and then delivered that package to the government. Is there anything in the engagement agreement that would have put Mr. Tournant on notice that the lawyers' access to him, which was premised on an attorney-client relationship, could be used in that way?

MS. NICHOLS: Again, your Honor, I think we do reject the premise behind the factual narrative that Mr. Tournant is pushing. And I think what we know is that there is a very short timetable between when Mr. Tournant alleges that S&C should have known of the conflict, which was the second day of Mr. Bond-Nelson's testimony, and the day that they actually terminated his engagement, which was on June 5th, about two weeks later.

So, again, the government doesn't have any reason to believe that Sullivan & Cromwell breached its ethical obligations to Mr. Tournant or the engagement letter that they had signed during that two-week period. But I think it's important --

THE COURT: Whose burden is it? Frankly, in the opening papers, I have a lot of exhibits which are documents that were produced. The government has made a lot of representations in its papers, but not given me a single declaration or affidavit. So I don't have a factual record before me. And neither side has made clear, besides Mr. Levine's blanket assertion that the burden for everything is always on the government, but in this particular instance, where is the burden?

MS. NICHOLS: Your Honor, I think it's important here to cite this argument in law, Mr. Tournant's argument. And what he is suggesting -- I am trying to answer the Court's

question. What he is suggesting is that the ethical breach by Sullivan & Cromwell, which, again, we don't concede existed, but supposing it did, is attributable to the government because the government has policies and principles in place to incentivize cooperation.

He must make that connection to the government's action in order to obtain relief from this Court here. He may otherwise and separately have civil remedies against Sullivan & Cromwell. There may be disciplinary remedies. But what he is asking this Court to do, to be perfectly clear, is to make new law. He is asking the Court to blaze a totally new territory. And he says that there is a constitutional violation here, but he hasn't cited it in any particular constitutional provision, and that is to obfuscate the fact that he is asking this Court to make a new rule, which the government submits would be ungovernable.

He cites to *Connolly* and *Garrity*. But there is no allegation here that he was coerced into sitting in that interview with his prior attorneys on June the 3rd. He doesn't make that allegation. He cites to a Sixth Amendment line of cases, which we also cite to in our opposition brief; but, of course, the Sixth Amendment doesn't apply to this situation either, as the Sixth Amendment does not attach until indictment.

And so, to answer the Court's question, there is no

standard to suggest that an ethical breach by someone's prior counsel should be attributable to the government. Even under the defendant's proposed *Kastigar* standard here, he has not made any showing to get further fact-finding. In order to get a *Kastigar* hearing, he must first demonstrate a factual relationship between the allegedly privileged information and the charges in the indictment. And I think here that's not met, for reasons that we just explained, that there is no privileged information. It's first his obligation to demonstrate that he held the privilege and that it was not properly waived, and that he hasn't done, and he hasn't even put in a declaration on that point, and he hasn't made any of the assertions that I opened with.

THE COURT: So do you reject as a matter of law the defense assertion that the waiver, insofar as it may or may not have been valid from the inception of the engagement agreement, was insufficient as of the time there was a conflict, and if there wasn't a knowing and informed waiver that included knowledge of the specific contact before additional information was provided, there is no effective waiver?

It's a little hard for me still to follow the precise line of the defense argument, but I gather it's either that it invalidated the waiver as of June 2nd, or whatever, or it invalidated the whole waiver, but that, nonetheless, to have a waiver that destroys any privilege built on Mr. Tournant's

expectation that S&C was still acting as his lawyer on June 3rd, he would have had to make a waiver in writing, fully informed of what had happened in terms of the forensic investigation and the change of Allianz's orientation.

I see Mr. Levine is nodding, it looks like affirmatively. So I am going to assume that I have captured at least some of the essence of his argument there.

MS. NICHOLS: Let me try to say that back to you, your Honor, so that I can make sure I am answering the question that you're asking.

I understand Mr. Tournant to be arguing that the waiver provision in his engagement letter was void at the point in time in which Sullivan & Cromwell knew that there was a conflict but secretly didn't tell him that there was a conflict. And so, I think that, to the extent that is a live issue, we don't have facts to support that point of view. But it's the government's position that we don't need to engage in that fact-finding in terms of Sullivan & Cromwell's process and their forensic review and their development of their understanding of the facts of the case and whether or not the precise moment that they understood that there was a potential conflict predated the moment that they conveyed that to Mr. Tournant through his independent counsel.

THE COURT: Because?

MS. NICHOLS: Because, your Honor, if there was an

ethical breach by Sullivan & Cromwell, that breach is not attributable to the government.

THE COURT: But the question that I am trying to ask you is whether, if there was that ethical breach, it's an ethical breach that, as Mr. Levine has argued, vitiated any validity that the waiver and ceding to Allianz's control over the privilege happened?

MS. NICHOLS: Your Honor, I think that the closest analogy, and again, I don't think this is apt because there is no Sixth Amendment right, but I think a close analogy would be the line of cases that the government cites in its brief. And the standard there is a showing that the government was manifestly and avowedly corrupt. And Mr. Tournant also has to show that he was prejudiced. And he cannot make either of those showings.

THE COURT: Doesn't the manifest corruption question arise only if there still is a privilege? And I thought I heard you a few minutes ago saying there is not a privilege because of the contract, and Mr. Levine is saying the change in position in attitude of Sullivan & Cromwell vitiated the contract so that there is no waiver, and furthermore, Sullivan & Cromwell's conduct should be attributed to the government such that the indictment should be dismissed.

I think that I have heard two different alleged consequences of the actions of Sullivan & Cromwell in the

argumentation. And you seem to want me to continue to rely on the engagement letter as something that deprived Mr. Tournant of any claim of privilege in the information at all, so that we don't even get to a question of taint of the government, and any dismissal of the indictment or finding of improper conduct would go to sort of the overall picture.

So, if it is privileged notwithstanding Sullivan's alleged conduct, why is it that that engagement letter provision still controls in the circumstances that have been posited by the defense?

MS. NICHOLS: I think your Honor understands that we do not agree that there was any kind of breach that would nullify the engagement letter. But if we are in a world in which --

THE COURT: If factually the defense is right about what happened, and let's just assume for purposes of this part of the argument and analysis that Sullivan knew and Sullivan plotted against its client in order to get something good to put in that birthday present it wanted to give to the government, does that conduct as a matter of law vitiate the waiver provision of the engagement letter so that what was in that birthday box is still privileged?

MS. NICHOLS: No, your Honor. I don't think there is any reason to think that a hypothetical ethical violation by Sullivan & Cromwell voids the agreement or means that Mr.

Tournant's waiver was not knowing and voluntary. I just don't think there is good reason to interpret the engagement letter in that way.

But if there were good reason to interpret it in that way, I just don't think that that question is before this Court, because Mr. Tournant would have some kind of civil claim, or he might want to raise a claim before a disciplinary committee about Sullivan & Cromwell's duties of loyalty to him. But that is not before this Court because Sullivan & Cromwell's actions cannot be attributable to the government, which Mr. Tournant needs to make that connection and there is no connection here.

And that is not so much a factual argument as a legal argument, your Honor. I think there is no basis for the rule that he wants this Court to adopt. And, in fact, the rule that he wants this Court to adopt would require the government to impermissibly wave into attorney-client relationships on a massive scale. It would require the government every time it went to corporate counsel to ask for a voluntary production of documents, or to serve a subpoena, to engage with corporate counsel about the status of their joint representation, or lack thereof, with potential other witnesses and employees of the company. The government did not do that here and the government should not be doing that.

THE COURT: You can continue.

MS. NICHOLS: Thank you, your Honor.

I want to address the Court's question about the crime fraud inquiry. I think that there is no need to resolve that at this stage of the proceedings because of our position that the information at issue here was not privileged, and that is just a cleaner, simpler way of treating it. But the government does think that there would be good reason to believe that some crime fraud exceptions would apply to information that Mr. Tournant supplied to Allianz during his June 3rd interview. And I think it's helpful to sort of understand that that is actually how all of this percolated and came to light in the first instance, is that the government raised to Allianz that it was concerned about crime fraud and asked Allianz to take another look at the privileged determinations that it had made, and this was back in the fall of '21. And it was after the government made that request that Sullivan & Cromwell provided full summaries of that interview.

So I think that the appropriate time and the efficient way to do this would be to look at crime fraud second, but we did want to flag for the Court that we think it is a live issue, in the event that the Court does not find that the waiver applied here.

THE COURT: Thank you.

MS. NICHOLS: I just want to address the government's use of a filter team here, and then I think otherwise, unless

the Court has other questions, I would anticipate letting Ms. Graham address the rest of the motion.

The government does not, and has not, conceded that the information here is privileged. Nonetheless, when we understood that Mr. Tournant was raising this argument, we endeavored to segregate out the disputed material and to take them out of the control of the case team and to put them into the control of a filter team. And that was done in an abundance of caution and because all of this was raised before the government brought the indictment here in this case so there was no judge to whom we could really elevate this issue squarely at that point in time.

These actions were done in an effort to be careful and to be respectful of the argument that defense counsel was making, notwithstanding that we did not think that it had any merit. And so I think that is important for the Court to consider in looking at both the allegation that the government's actions here have been manifestly and avowedly corrupt, as well as the allegation that Mr. Tournant has been prejudiced.

As the government has already explained in the papers, the government did not rely on any of the allegedly privileged information in presenting this case to the grand jury, and so there is no way that Mr. Tournant can make a showing under these circumstances that he has been prejudiced by this

information.

THE COURT: Let me point out once again I have that as a representation in your brief. I have no evidence as to what went to the grand jury, no evidence as to what went into the government's thought processes, no evidence as to the relationship -- and I am anticipating Ms. Graham's part of the argument here -- between the SEC investigation and the prosecution. Are you planning to rest, for purposes of my determinations, on the briefs to the extent I find there are material factual issues here?

MS. NICHOLS: To the extent that the Court finds that there are material factual issues here, I think we would like the opportunity to address them through whatever mechanism the Court would find helpful.

THE COURT: Assume for the moment that I have no facts in front of me now. So what am I supposed to do with this record?

MS. NICHOLS: It's our view that on this record there are no material disputed facts.

THE COURT: So it's not material to my determination that the government says that it didn't use any of this information before the grand jury? I can just ignore that and say, if it did, it didn't, it doesn't matter. It's not material that the government represents that it did not use any of the allegedly privileged information in crafting the

indictment? I can just say, one way or the other, that doesn't matter as a matter of law? Can you take me through that analysis?

MS. NICHOLS: It's our position that the material at issue here is not privileged because Mr. Tournant waived. And we think that's a legal issue that the Court has the ability to decide here. I think the burden is on Mr. Tournant in the first instance to demonstrate the validity of the privilege and that he didn't waive. He has not even put in a declaration on those points. So I think that the Court can decide this on that top-line issue without further inquiry.

In the event that there is a factual record that the Court would like to develop, I think the government and both parties would benefit from some guideposts about what factual record would be helpful or unhelpful. But that's sort of the reason why the government didn't in the first instance put in affidavits and declarations.

It's our position that Mr. Tournant has not made the requisite showing to get a hearing here. I think that there is law that suggests that, outside of the *Kastigar* context, when there is allegations of government misconduct, the defendant has to make a substantial preliminary showing in order to get fact-finding, and Mr. Tournant has not made such a showing here.

THE COURT: And are you deferring on the question of

whether facts are necessary to resolve the *Brady* issue to Ms. Graham?

MS. NICHOLS: Yes, your Honor.

THE COURT: All right. Thank you.

MS. NICHOLS: Thank you.

Ms. Graham, you're up now. You have a little over 17 minutes once you get to the podium.

MS. GRAHAM: Thank you, your Honor.

Just one additional point, if I may, on the privilege point that I just discussed with Ms. Nichols.

I think it's also helpful in understanding the timeline of the case here and how it may track with the other cases cited by defense, is that the relevant events took place between May 20th and 21st, when Mr. Bond-Nelson had his deposition, and June 3rd, when Mr. Tournant was interviewed or prepped by S&C.

The government did not notify Allianz or S&C of its investigation until June 10, after any of those events took place. And so, to find that Allianz or S&C's conduct in that time, which for all the reasons Ms. Nichols noted there is not an evidentiary record to show that it was improper or that it in any way invalidated the clear engagement letter, to impute Allianz's conduct during that time to the government, there is just no basis in the record to do so. And what Mr. Levine urges that is a broad policy set by the government about

corporate prosecutions means that anything a corporation does, even before it has had a single communication with criminal authorities, can then be imputed to the government, there is just simply no basis for that in the law and that would be in fact extraordinary.

Your Honor, moving to the motion about *Brady* and the SEC. The SEC is not part of the prosecution team for *Brady* purposes here. It is a separate and independent agency that engaged in a parallel investigation. As your Honor knows from the case law, and I know you have read the briefs carefully, to be part of the prosecution team, an individual or entity must have been acting on the government's behalf or is an arm of the prosecutor. And that is not what happened here. This was a parallel, not a joint investigation. And a finding that it was a parallel investigation here would be consistent with the finding of numerous other district courts who have examined similar sets of facts, including the judges in *Middendorf*, *Blaszczak*, *Collins*, *Chow*, *Velissaris*, and *Alexandre*, to cite just a few recent examples.

So, going one by one through the factors that courts in this district have considered, it's clear that the SEC was not part of the prosecution team, and that the SEC and SDNY did not conduct a joint investigation.

The first of the factors, cited in cases like *Middendorf* and *Blaszczak*: Did the SEC participate in witness

interviews with the DOJ? They did, but only after witnesses were given separate warnings by the SEC and DOJ teams, told that the teams were conducting separate investigations. And, to be the clear, the SEC took no notes. The DOJ was responsible for the only set of notes of those witness interviews.

THE COURT: Where is my evidentiary record on that?

MS. GRAHAM: Yes, your Honor. We did not submit affidavits consistent with our practice. In other courts where this has come up, we have proffered those facts in the record. They are undisputed, and, in fact, some of that is reflected in interview notes that have already been turned over to defense. But, of course, if your Honor determines that an affidavit or some further showing on this is necessary, we can provide that. But we did follow our customary practice when this has been litigated in other cases.

THE COURT: Well, Mr. Levine, when he comes back for his rebuttal, can tell me whether, to what extent, and on what basis the defense would dispute any of those representations.

MS. GRAHAM: Thank you, your Honor.

I would also note that in this case, where there are two independent agencies investigating the same fraud, there is nothing wrong or improper or unusual about, for witness convenience, interviewing a witness at the same time, so that that witness does not have to sit for two separate interviews

and perhaps travel for those interviews.

Was the SEC involved in presenting the case to the grand jury? It was not.

Did the SEC review documents gathered by or share documents with the prosecution? It did, but it did not review grand jury material and it did not participate in the execution of any search warrants or in the responsiveness of the search warrant returns. And there, again, I would note that it is normal and appropriate to share documents and information. The government and SEC are both tasked with protecting victims of billing and dollar frauds like occurred here, as well as the markets. And so it's not remarkable, and in fact it is routine, to share information. That does not convert this into a joint investigation with the SEC.

Did the SEC play a role in the development of prosecution strategy? It did not.

And did the SEC accompany the prosecution to court proceedings? It did not.

Your Honor, I am happy to answer any other questions. Other than that, we would rest on our briefs for our argument.

THE COURT: Since this is the last time you stand up on this, I have reviewed your brief, I hear your explanation that you're providing your predicate facts by way of proffer. As I said, I will ask Mr. Levine whether there is any dispute or basis for disputing them. So if there is nothing else that

you want to say to augment what is in front of mind for me, that's fine, I don't have specific questions for you aside from that.

MS. GRAHAM: I am also happy to reserve time. It was a little bit out of order. Generally defense would argue their motion first. Mr. Levine understandably preferred to address the privilege motion. But given that, I haven't had an opportunity to respond to anything he might say orally, and so should the Court find it necessary, I am happy to stand again and answer any questions that arise after Mr. Levine for the first time orally argues this point.

THE COURT: Well, we have got ten minutes still on the clock out of the government's 45 so we will see what is necessary and appropriate after Mr. Levine has returned to the podium.

MS. GRAHAM: Thank you, your Honor.

THE COURT: Thank you.

MR. LEVINE: Your Honor, respectfully, the government simply invites this Court into error by skipping virtually our entire argument.

Number 12 in your package, which we can put up on the screen, are the principles of prosecution that say any joint defense arrangement that disables you from providing us information can be held against you.

That policy is part of an original policy that is part

of the same policy in *Stein*. You didn't hear a word about *Stein*. In *Stein* and in *Connolly*, the test is whether or not the government is encouraging this behavior. That's the law in this Circuit. And they are encouraging this behavior because they tell everyone at every conference and in every statement, if you don't give us your people, and if you do anything to have a structure that doesn't let you do this, you're going to get in trouble with us, and in this case you're going to get killed. That's the policy. And *Stein* and *Connolly* and its progeny say it's attributable to the government if people follow it.

Now, the question is, is it improper? The problem here is that Sullivan and Ropes, and Ropes is a different engagement letter, basically decided to represent Tournant. And then -- and, by the way, there is a government investigation. They know it's going on. Things get bad. They say to the government, we immediately decided we are going to cooperate. They know what's coming. In fact, both in *Stein* and in *Connolly*, the court said, you don't have to be told by the government, you look at the policy.

If they are contesting the policy, they won't even identify it for you, let's have a hearing. There is a factual issue.

There is no question what happened here.

THE COURT: I let you ride over me a minute ago. Not

now.

So, yes, they say there is this policy. We have engagement letters that you acknowledge or an engagement letter that is meant to be written around that. Are you saying that because of this policy, and because the government encourages corporations in general not to shield their executives, that's fundamentally corrupt?

MR. LEVINE: No. What I am saying is, if you have a policy that basically puts somebody in a position where their corporate life is threatened, and they end up breaching their obligations to their employee, it's the regular and natural result of what they have done. In the same way that KPMG --

THE COURT: When you say breaching obligations, and again, there is the question of what the fundamental obligation is. We have an engagement letter that says, we can decide to turn the information over that we have gathered in the course of the joint representation.

MR. LEVINE: But that's not what it says, your Honor. I am happy to take you through it.

THE COURT: It says that if they find that there is a conflict, that they will discuss it and seek to resolve it in a mutually acceptable manner. It doesn't say that if there is no mutually acceptable manner, they will never turn the information over. And there is a question, as the government has pointed out, as to whether there are appropriate and

sufficient remedies on the civil side and the grievance authority's side to remedy conduct that is found to have been a breach of the lawyer's ethical obligation without punishing the government for it.

MR. LEVINE: First of all, the ethics rules don't permit that. The ethics rules do not permit an unwaiveable conflict to be unaddressed. Even if it's waiveable, you have to address it. And the letter actually says that the SEC will only turn the materials over if and when it deems appropriate. No lawyer can deem appropriate turning materials over when they know they are laboring under an unwaiveable conflict. And if you read the agreement as you just suggested, your Honor, it's basically a contract of adhesion. Mr. Tournant has no rights to protect himself.

THE COURT: He had Milbank Tweed as his lawyer when he decided to enter into this agreement. Maybe he should sue them for malpractice.

MR. LEVINE: Your Honor, in *Schell*, in *Sabri*, the abuse of the attorney-client privilege, these lawyers went and advocated actively against their client. Regardless of whether even materials could have been turned over, which they can't, you can't switch sides. This is not a game of gotcha. You literally have lawyers going into the government and saying, after we say this is privileged, prosecute this guy and save us. We don't have a system like that. They didn't mention

Schell to you. *Schell* says, a guy who is on the government side, who doesn't even do anything, it's so bad that we have to throw it out. *Sabri* is the same. This conduct is so far out of the norm.

THE COURT: *Schell* was the one who had been a lawyer and then literally was a prosecutor, correct?

MR. LEVINE: So the only question there is attribution of this to the government. And I have shown you under *Stein* and under the other cases that if they adopt a policy that promotes this, that's enough.

But you know what, your Honor, if you're saying I am not sure, you have to have a hearing, just like Judge Kaplan did. He had three-day hearing on this issue so he can satisfy himself that just cutting off legal fees meets the standard, which the circuit said it easily did. We will offer, if necessary -- we have offered to you, and I take great umbrage that the prosecution has their taint team sitting here who knows the information. We gave you the transcript of the meeting. We gave you the notes. And what they say, and what they show unmistakably, is a conflict and an ambush. The government's first page of their brief says, Sullivan didn't start cooperating until they knew there was a problem. Right. On the 22nd of May, when they watched their other client start blaming Mr. Tournant, or denying blaming it, and they clearly understood the SEC was looking at that. And they were

investigating for a year. And, by the way, your Honor, this is parallel. I am not good at math, but I know this. This is parallel. They don't intersect.

Every single aspect of this investigation is intersecting. And the United States attorney stood up and said, this investigation -- and I will play it for you if you'd like -- was run by the office, the SEC, and the postal inspector. I take his word for it. And the government has offered nothing on that.

So you have the SEC and the government talking to each other. And my other cases where we have had this, we have gotten all of those communications. What did they talk about between the 22nd and the 3rd? I will tell you what they talked about. Multiple applications that says we got our stuff from the SEC. What did the SEC tell them?

THE COURT: I'm sorry. I am getting lost as to who your them's and they's are.

MR. LEVINE: What did the SEC tell the government? They all knew there was a joint representation here.

So, your Honor, what I am saying to you is --

THE COURT: They all knew, as in the SEC knew, or you're inferring that because you posit that the SEC knew because they were serving things or --

MR. LEVINE: They were sharing information, and they have not provided us all of that information. But it's clear

the government was talking to Mr. Bond-Nelson. They knew he had been represented by Sullivan. No basis to suggest they didn't know all the people represented by Sullivan. They are talking to the SEC. They know. Sullivan & Cromwell 100 percent knew there was a problem. They told the government that. And I have put in a transcript to you that on page 35, Sullivan asks my client a question that specifically makes clear that they know exactly what the allegation is. And it's part of an ambush.

Now, your Honor, I did put in evidence. They didn't. These guys didn't look at it; and instead of having the taint team argue this, they want to pretend they don't know. Their whole argument to is, your Honor, there is not a factual record. This a factual record. They haven't looked at it and they haven't offered any of their own. So on this factual record, you need to rule for me or, at minimum, you need to have a hearing. But the notion that we haven't -- I put in so many exhibits in this case that prove our point. And on the privilege, as we have proffered, it violates the language of the agreement. It violates New York State, New York City ethics opinions and ethics rules. There is no way to provide informed consent without revealing the facts. And we have proffered to you and it's in the transcript that material was withheld.

When I meet with Mr. Tournant, if I don't tell him the

truth, if I am not candid with him, I have breached my obligation. And if I am not candid with him because I am protecting another client, I have an unwaiveable conflict and I have to stop. That's the law. They don't contest that. But if you want to have a hearing on that, we will put an expert on that will say that has always been the law in the state of New York.

So the notion here that we don't have a record -- and there's two standards. The avowedly corrupt standard has nothing to do with prejudice and it has nothing to do with *Kastigar*. What it has to do with is the switching of sides is so inimical that even without any prejudice you have to throw it out.

THE COURT: It was the lawyers who, as you put it, switched sides, not the government. You need to attribute that behavior to the government in order to have a predicate for your demand for a dismissal of the indictment.

MR. LEVINE: Yes. The policy is the predicate. And they have not disputed in their papers the policy.

Now, I understand that there are a lot of moving parts here. And I will tell you, and this is not the same as the situation before Judge McMahon, but the issue was, do *Upjohn* interviews, where you're not the lawyer, cannot be attributed to the government? And Judge McMahon started with the idea that no. At the end she said absolutely. This was an

outsourced investigation.

Here, the question is, do these policies cause that? We have cited for you a Sullivan & Cromwell legal piece that specifically says, Hey, by the way, under this memo, you have got to be really careful because you might end up, if you're representing an individual, you might end up with an unwaiveable conflict of interest and the government is going to hold it against you because you can't share the information. They wrote that years before this all happened.

So the notion that we are sort of just fantasizing about this is crazy. What has happened here is there is a coordinated arrangement between the government and big corporate parties that basically boxes in individuals and punishes companies if they don't do that. And that's been proven before. It was exactly what happened in *Stein* and the circuit said this is unconstitutional. It was found unconstitutional in *Connolly*. And the Court should look at this. Because this whole corporate cooperation issue, it's not necessarily illegal, but it has the ability to distort our adversary system, and that's what happened here.

Your Honor, they are arguing to prosecute their client. Is there no space that an individual has to defend himself? They don't need it. They have every resource. And the notion that the government stands up and says, you have nothing to see here, this is just how we do it, that's the

problem. An individual's ability and his rights are being absolutely destroyed.

Now, let me just talk to you very, very briefly about *Kastigar* so we can get this straight. Judge Gardephe said -- the circuit hasn't actually defined exactly what the standard is, the burden that I have to meet to get a *Kastigar* hearing. He decided there wasn't one. He says in *Landji*, no, they get a hearing.

Let's also step back. They keep saying the information is not privileged. That's wrong. The argument they should make, because it's the only one that is actually honest, is that there is privileged material, because it's material from attorney-client communications, but the privilege belongs to Sullivan & Cromwell and Allianz. So this argument that there is no privileged information, that's wrong. It doesn't help or hurt, but it is just not accurate legally.

There is privileged material from an attorney-client communication. The only question is, who has the right to waive it?

Now, you do not have the right to take advantage of a blanket waiver when the facts change. New York State Bar Association, that's the ethics rules. It's also the fact that in all the cases about disqualification in this circuit, switching sides is considered totally inimical. The notion that a lawyer changes sides, and then when you add on top of it

they change sides by using the privileged information, using the information that the government could not otherwise get. And we have shown in our brief how each one of the topics, the cross-examinations are part of the indictment. The burden is on them, not on me, to show you it's not in there.

And I will suggest this to you, your Honor. I think there is no question that the privilege was not waived. You may not at this moment agree with me. Hope springs eternal.

THE COURT: I am here to listen.

MR. LEVINE: What I am saying is this: At minimum, if it is privileged, then I am right, you have to have a *Kastigar* hearing. Because this indictment is absolutely tainted. The prosecution team is tainted. In fact, the entire office is tainted because these meetings went all the way up to the U.S. attorney.

I am just saying, your Honor, think about the idea that your lawyer is now sitting across the table from the United States attorney demanding your prosecution. What is a person to do? And if we want to get into the idea that Mr. Tournant has no rights, this engagement letter is meaningless, if you want to read it that way, then, yes, our argument is it's unconscionable, and it is a coercive agreement, and a coercive agreement designed for the government, those statements cannot be used.

The agreement is very one-sided. They could have done

everything that they did here with a standard *Upjohn* warning and a joint defense understanding, which is how it usually happens. They didn't. Because they wanted to be in the room with the SEC. And if you really take them seriously, they are saying, Well, for the SEC, we will say we are his lawyer, but in any meaningful way, we are not. We are not going to give him loyalty. We are not going to give him confidentiality. And we are not going to give him candor.

But the problem you have, your Honor, is you can't do it that way. They should have stopped. The best the government says to you is these prosecutors say they don't know, although some of them have seen this information before. We have got transcripts. They hammered Mr. Tournant, and they asked him about something that they didn't disclose. That fact alone, that your lawyer wasn't candid with you, especially when they have a motive for that, that raises a fact question, and I have put it before you.

So I think, your Honor, you should dismiss this indictment on its face and send the message that the attorney-client privilege is not something that should be the subject of sort of supplication to the government to prove your cooperation. I mean, we have put in for you, your Honor, a statement by the lead lawyer here, essentially saying, how much can I cooperate? I am even facing potential personal discipline to be able to help you here. That's not how we

should be running this system. And it's dangerous.

And with respect to this SEC point, the SEC and the government coordinated everything. One set of notes? How do you have one set of notes in a parallel proceeding? I have the notes here. You're running an investigation and you don't get the notes of the meetings with all the key witnesses? There is nothing parallel about any of this. And they stand up in the press conference and the U.S. attorney says, We along with the SEC ran this investigation. Are they saying he made a false statement? I don't believe that for a minute. They shared interviews. Most of the documents came from the SEC. The SEC helped them with pen register applications. The SEC has been there with them all the time. And everyone knows that is what is happening. The notion that these meetings with the witnesses are somehow parallel meetings that are happening at the same time, this is all nonsense.

Let me tell you why it's happening. It's happening because they are trying to prevent people from getting *Brady*. You don't have to reach the constitutional issue. You have an order that you issued that says anybody who is involved in this investigation provide the information. You have three brothers and sisters on this bench in this court who have a rule that says you have to turn it over. And they do. And in many cases this isn't a fight.

And what are we fighting about? I am not asking the

government to go to the middle of the midwest to some obscure government office because some guy was in the building being interviewed. We are talking about the people who stood up at a press conference and genuflected about how great their cooperation was, and have been interacting in this case from day one.

The investigation was supposedly going on a year before we even got to going overt. What happened? They won't give me any of the communications. Why not? If they weren't coordinating, what is there to give me? And why are they doing this? Because, Oh, my gosh, I might get some information that shows what we already know about this case generally, which is this is a very unfair prosecution, that witnesses will show that this is an unfair prosecution. But we can't get that information.

What is the rule of law value here? These people worked with them. Interviews, documents, and every other aspect of this investigation. They say they didn't go into the grand jury; it's illegal for them to go in the grand jury. They announced their indictment the same day as the SEC announced their charges. Mr. Bond-Nelson and Mr. Taylor, who pled guilty under seal, entered into agreements with the SEC before those were unsealed that referenced those agreements. How did they get sealed criminal cases? Because they are talking all the time.

I am not objecting to that. I agree with Ms. Graham entirely. You are absolutely allowed to coordinate with another agency. What you're not allowed to do is coordinate and then tell this fairy tale that we are acting in parallel, that we are acting in a non-intersecting way. And in many cases, the court says, yeah, you can get all the intersection.

So, if the government is right, then turning over to us all of the communications, all of the interactions, so they can stand up at an evidentiary hearing and show you, see, we really didn't work with them, fine. But the notion that they are just to going to proffer that its parallel, it's not parallel in any sense of that word. So that's my point on that.

Just returning briefly, your Honor, I would like to show you, if I can, just some of these slides, which I think you have seen before, that show what was turned over and what was used, that are basically line by line from these interviews. It's pages 7, 8, 9.

These are prep sessions. These are sessions in which not only did they ambush Greg, but at times -- it's in the briefs -- they encouraged him on how to answer a question. They coach him, not in an improper way, as you do. They are working with him to prepare. They are, in fact, role-playing some of this. So under the guise of prep, he is actually being interviewed by the government, because this is all going to the

SEC and going to the government.

We can't have that. There is no public policy justification for that. In fact, in *Schwimmer*, the Second Circuit was so clear, in a case, by the way, about an accountant who wasn't even a lawyer. The circuit said, it's fundamentally meaningless if you undermine the full and frank communication relationship between an attorney and a client. If we can't have candid conversations with our clients, then we can't stand up in courts like this and effectively represent them, because they won't trust us, and they shouldn't trust us.

And the notion now that the government wants to play a gotcha, because there is a way to read this agreement, which is so completely one-sided that no one would enter into it unless they had no choice.

What I would suggest to you --

THE COURT: Are you saying Mr. Tournant had no choice but to enter into that agreement?

MR. LEVINE: I think, your Honor, there is an element for a corporate employee of a lack of choice because you have to either choose your liberty or your job. Here, the difference was that, unusually, the lawyers for the company said, No, no, we are not just going to give you an *Upjohn* warning; you have got a lawyer there, whatever you say we can use. They stepped across the transom and said, we are your lawyers. And they did that for their own reasons. And it's

not a bad reason. But what you can't do is take on a joint representation and then when it becomes inconvenient, drop your client like a hot potato and throw him to the wolves. It's bad enough they make disclosures. They are actively advocating for his destruction, actively saying, prosecute this guy. Why? Because we are facing the death penalty.

THE COURT: So you accept that a company could have reacted to the guidelines by giving *Upjohn* warnings and eschewing joint defense arrangements entirely, that the government doesn't preclude that.

MR. LEVINE: That's right. The question then would be whether or not the government was essentially -- they were really outsourcing the investigation. That's a different question, not for today. What I am saying is what happened here is they didn't do that. They decided to become his lawyer, and once they did, they had actual obligations as a lawyer.

THE COURT: The "they" being Allianz, Sullivan & Cromwell's counsel?

MR. LEVINE: Yes. In fact, if you look at the Ropes agreement, they don't even have this provision. They say we are never going to reveal your confidences. So there is a whole other issue there that we raised in the brief, which is Ropes is in these meetings as well. But just taking the Sullivan & Cromwell example, they became his lawyer, and that

has consequences.

And the reason here that I say your decision is more narrow is because you're not taking on the entire question of how corporate counsel needs to behave; you're taking on the question of how individual counsel needs to behave. And the *sine qua non* of joint representation, according to the New York State and the New York City Bar Association for years, is you always have to be ready to reevaluate. And if it turns out that you have a conflict, you have got to either get out or get a waiver that is legitimate. And they didn't do that.

And, your Honor, I would really ask you to look at the materials we have provided and the citations in the sealed materials because they show you, without any question, that there was a conflict here. And once that happens, there is no valid waiver. And, really, I would also just ask you in conclusion to ask yourself: Does this seem like the way we should be running this system? That it's just a game of gotcha for people who are dealing with the most significant, most dangerous situation of their life, and they have all these lawyers around, that basically we are going to play a game of gotcha with them and people that are their lawyers are now going to turn out to be their chief antagonists? Is that really who we are? Can't we run a system that says, you know what, you represented that person, that's it.

We have cases where people will not reveal privilege

to help other people because it's improper. And here, it's just too far. It's too far and it's inconsistent. And all the cases I cited to you -- *Schell*, *Sabri*, *Prevezon*, *Emle* -- they all say, switching of sides, switching of sides is something we simply can't have in the adversary system. And that's true in *Schell* even though no privileged material in *Schell* was turned over, none. In fact, the person there really had some relationship to the case, but did nothing to formally himself prosecute his client.

THE COURT: And we deter that conduct and punish the government as an enabler by dismissing an indictment?

MR. LEVINE: Yes.

THE COURT: Thank you.

MR. LEVINE: Thank you so much, your Honor.

THE COURT: Ms. Graham, Mr. Levine has said that the defense draws inferences that it considers contradict all of the government's proffers as to the nature of the investigation, and has also made some other *Brady* arguments. Do you want to respond to that at all?

MS. GRAHAM: Yes, your Honor, briefly, because I think I may have responded to many of the points already, and I don't want to prolong what is already a long conference. But just very briefly, the one thing that I haven't addressed was his arguments about the U.S. attorney's statement at the press conference, that this was an investigation run by this office,

the SEC, and the Postal Inspection Service.

I just want to put that statement in context for your Honor. The video, of course, is publicly available. But just to put it in context. That was in response to a question from a reporter about whether the resolution was coordinated with regulators in Germany. And so, what the U.S. attorney was doing, in his *sua sponte*, not prepared remarks, he said he can't speak to the interactions with anyone in Germany, but that this investigation has been run, and then he did say, by this office, the SEC, and the postal service.

That wasn't the clearest phrasing, but it's clear especially if you look at the other statements, the prepared statements in the press conference, in which the investigations were discussed as parallel proceedings, and it was clear that the U.S. attorney was announcing the criminal case and the SEC was announcing the parallel civil case. It's clear that by that, perhaps, slightly unfortunate wording, the U.S. attorney was not in any way saying that this was a joint investigation. As your Honor knows, it's been the long position of this office and we take care when we conduct our investigations to keep them parallel investigations, and there is no basis to take this one statement as saying something entirely new, that the SEC, a separate and independent agency, was part of the prosecution team for purposes of the government's constitutional obligations.

So I did want to address that one statement. For the remainder, I will rest on my papers.

Thank you.

THE COURT: And you're resting on your proffers as sufficient factually and your argument as to contextualized construction of the U.S. attorney's statement?

MS. GRAHAM: Yes, your Honor. As noted, we are happy to supplement the record should you find it necessary.

THE COURT: If there is anything else that you want me to consider by way of declarations, file them by next Friday.

MS. GRAHAM: Thank you, your Honor.

THE COURT: Mr. Levine.

MR. LEVINE: Your Honor, if the Court is going to consider declarations from the government, we obviously would like an opportunity to respond.

THE COURT: Yes. Any response by the Friday after that. So that's the 28th for any declarations by the government. And then the Friday after that is May 5 for response by the defense.

MR. LEVINE: May I say one more thing? I apologize.

Your Honor, I must say, if the government is going to start putting in evidence --

THE COURT: Hang on. I have to turn off this printer.

All right.

MR. LEVINE: Respectfully, your Honor, if the

government is now going to decide to put in evidence that it could have put in before, and you are going to allow it, we would ask for discovery. Because the problem here is all of these issues are still shrouded. If they want to put in information on the SEC's relationship with them, or they want to put in whatever it is that they want to put in, then we should get what we get in other hearings, which is we should get discovery. Let's have a factual record. Because it's really unfair for the government to say -- and we have asked them for this information. We have asked them for the grand jury minutes. We have asked them for the interactions between SEC and S&C. They said no. Now I understand the Court wants to potentially take a supplemental set of briefs on the factual circumstances. I think the Court should order the government to give us the discovery we have asked for so we can have a meaningful response. And I also suggest we should have a hearing on these issues.

THE COURT: I understand that that is and has been your position. I will consider, after receiving these submissions that I have just authorized, whether discovery and/or a hearing is necessitated by the nature, content, breadth, inconsistency with the proffers, or whatever may be argued by the parties in their submissions. And I have not yet resolved the motion insofar as it seeks discovery and/or a hearing. I have yet to determine whether that's necessary.

MR. LEVINE: Thank you very much, your Honor. I appreciate it.

MS. GRAHAM: Your Honor, just one more question for clarity sake. The declarations that you want are on the joint and parallel motion, correct?

THE COURT: Yes, the *Brady* issue.

MS. GRAHAM: Thank you, your Honor.

THE COURT: We are adjourned.

Thank you all very much.

(Adjourned)